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14
15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**
16 **CIVIL – UNLIMITED JURISDICTION**
17

18 ADRIAN RISKIN,
19
20 Petitioner and Plaintiff,
21
22 vs.
23
24 DOWNTOWN LOS ANGELES PROPERTY
25 OWNERS ASSOCIATION, a non-profit
26 corporation,
27
28 Respondent and Defendant.

) Case No.: BS174792

) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN SUPPORT OF**
) **VERIFIED PETITION FOR WRIT OF**
) **MANDATE UNDER THE CALIFORNIA**
) **PUBLIC RECORDS ACT**

) **[Gov't Code § 6250, et seq. Civ. Proc. Code §**
) **1085, et seq.]**

) **DATE: June 26, 2019**

) **TIME: 9:30 A.M.**

) **DEPT: 86**

) **JUDGE: Hon. Mitchell L. Beckloff**

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1 **I. INTRODUCTION**

2 This is an action to enforce the California Public Record Act ("CPRA") against the Downtown
3 Los Angeles Property Owners Association, a.k.a. the Fashion District Business Improvement
4 District ("the BID" or "Respondent"). Petitioner Adrian Riskin, a college professor, in 2017
5 requested easy-to-provide records related to the operation of the BID. Requested records include
6 Board Member emails, BID communications with consultants retained to lobby the Los Angeles
7 City Council regarding the BID's renewal, and BID communications with the South Park BID and
8 the Downtown Los Angeles Neighborhood Council. The BID, by a combination of delay, non-
9 response, refusal to provide Board Members' emails, and baseless assertion of the "deliberative
10 process privilege," has unlawfully frustrated public access to the requested records.

11 The BID has failed to meet the burden to justify non-disclosure which rests upon agencies
12 resisting transparency under the Public Records Act. Accordingly, this Court should grant the
13 Petition for Writ of Mandate and order the BID to disclose the records which it has withheld.

14 **II. FACTUAL SUMMARY**

15 **A. Background on Respondent BID.**

16 This litigation concerns three separate CPRA requests Petitioner Adrian Riskin (hereafter
17 "Petitioner") submitted to Respondent, which contracts with the City of Los Angeles to manage the
18 Fashion District Business Improvement District.¹ In 2018, the BID collected over \$4 million in
19 revenue, the large majority of which it obtains from assessments to parcels of real property which
20 the City of Los Angeles collects and disburses to the BID. (Cisneros Decl. ¶11.) The BID uses these
21 funds to, among other things, operate a private 24-hour security force, to advocate to the City of Los
22 Angeles on behalf of property owners, and to provide certain services such as graffiti cleanup.
23 (Cisneros Decl. ¶12.) Respondent is subject to the CPRA under both its contract with the City of
24 Los Angeles and pursuant to California Streets & Highways Code § 36612. Respondent's Board of
25 Directors is explicitly subject to the CPRA under its contract with the City of Los Angeles. (Petition
26 ¶31.) According to a roster found on the BID's website, as of 2016, Board Members listed non-BID

27
28 ¹ Respondent Downtown Los Angeles Property Owners' Association is a property owners' association pursuant to the
Property and Business Improvement District Law of 1994, California Streets & Highways Code §§ 36600, *et seq.*

1 email addresses as their official email contacts. (Cisneros Decl. ¶13.)

2 **B. Petitioner submitted three CPRA requests and the BID failed to comply with its**
3 **obligations under the CPRA.**

4 At issue in this litigation are the BID's responses to three CPRA requests which Petitioner
5 submitted on May 17, 2017, July 7, 2017, and July 31, 2017, respectively. In replying to these
6 requests, Respondent failed to comply with mandated response deadlines, denied access to records
7 by refusing to conduct adequate searches, and unlawfully withheld records by improperly claiming
8 the deliberative process privilege.

9 1. Request #1 – (1) Communications with the South Park BID and the Downtown Los
10 Angeles Neighborhood Council and (2) Chairman of the Board Mark Chatoff's
emails.

11 On May 17, 2017, Petitioner submitted a CPRA request ("Request #1") to the BID. That request
12 sought three categories of emails, two of which are at issue in this action. Item #1 sought all emails
13 between anyone at the BID, staff or Board, and the South Park BID or the Downtown Los Angeles
14 Neighborhood Council ("DLANC") from January 1, 2016 through May 15, 2017. (Petition, ¶10.)
15 Item #2 sought all emails from 2017 in the possession of Mark Chatoff, the Chairman of the BID's
16 Board of Directors, relating to the operation of the BID. (Petition ¶10.)

17 The BID did not respond within 10 days with a determination of disclosability and estimated
18 date of production as required by Cal. Gov. Code § 6253(c).² (Petition ¶11.) After nearly two
19 months, and a July 6 reminder email from Petitioner, the BID substantively responded on July 14,
20 providing a dropbox link³ containing approximately 46 emails which the BID described as "the
21 completed response." (Petition ¶11-12; Riskin Decl. ¶2.)

22 The July 14 response was deficient in several ways. The response did not include a
23 determination as to whether each Item sought disclosable records in the possession of the BID and
24 failed to inform Petition whether any records were being withheld subject to exemption. (Petition
25 ¶12.) Most notably, the record production appeared incomplete: the production contained no emails
26 from Board Members in response to Item #1, and the disclosure did not contain even a single email

27 ² Unless otherwise stated, all references to code sections are to the Cal. Gov't Code.

28 ³ Dropbox is an online service which permits a user to upload documents which can be accessed and downloaded by those who are given access.

1 from Chairman of the Board Chatoff in response to Item #2. (Riskin Decl. ¶2.)

2 Rather than proceed directly to litigation, Petitioner made several attempts to learn whether
3 responsive records were withheld and why the BID failed to produce any Chatoff emails. (Petition
4 ¶¶ 12-14.) The BID provided no clarifications beyond asserting that “all non-exempt records have
5 been submitted,” that “any exemptions are due to deliberative process,” and that “the BID has no
6 records responsive” to Item #2. (Petition ¶12.) The BID declined to confirm whether responsive
7 records were, in fact, withheld subject to a claim of the deliberative process privilege, or whether it
8 asked Chatoff, or any other Board Member, to search for responsive emails. (Petition ¶ 12-13.)
9 Petitioner brought the request to Chatoff’s attention directly in an August 18, 2017, email, but
10 neither BID staff, nor Chatoff, produced additional records. (Petition ¶14.)

11 Petitioner has obtained—via CPRA requests to other BIDs—records responsive to Items #1 and #2
12 which were not produced. (Riskin Decl. ¶3.) Those records include emails from BID staff to
13 individuals at the South Park BID and DLANC responsive to Item #1 which were not included in
14 the dropbox production (Riskin Decl. ¶¶ 4-8). The BID either unlawfully withheld these records
15 under the deliberative process privilege, or failed to conduct an adequate search to locate them.

16 2. Request #2 – Emails between the BID and Urban Place Consulting (“UPC”).

17 On July 7, 2017, Petitioner submitted a CPRA request (“Request #2”) for “all emails between
18 anyone at UPC and anyone at the BID (staff and Board) exclusive of [BID Executive Director Rena
19 Leddy] from January 1, 2017 through whenever you comply with this request.” (Petition ¶17.) UPC,
20 a consulting firm that specializes in serving BIDs, contracted with Respondent in January 2017 to
21 provide services related to the BID’s upcoming renewal. (Petition ¶18.) The scope of UPC’s
22 services under the contract includes attending/facilitating Steering Committee Meetings, creating a
23 multi-year Management Plan and Engineers Report, refining BID budget for inclusion in the
24 management plan, and testifying at Council committee meetings and Council meetings as
25 necessary. (Petition ¶18, Ex. H.)

26 The BID responded on July 17, asserting that Request #2 sought “some records which are
27 exempt from disclosure as deliberative process” and estimating that it would provide all non-exempt
28 records and information “within the next two weeks.” (Petition ¶19.) Petitioner challenged the

1 BID's assertion of the deliberative process privilege, citing to the public interest in municipal
2 lobbying as stated by the Los Angeles Municipal Lobbying Ordinance (Los Angeles Municipal
3 Code § 48.01, *et seq.*) In response, BID Director Leddy reasserted "I have determined again that the
4 exemption raised applied." (Petition ¶20, Ex. J.)

5 The BID did not provide records within two weeks. (Petition ¶21.) Petitioner inquired as to the
6 request on August 18th, but received no response until October 13th. (Petition ¶21.) In that
7 response, the BID stated, confusingly, both that Request #2 sought records exempt under the
8 deliberative process and that the BID did not have responsive records. (Petition ¶21.)

9 The BID's claim that no records exist is not credible. The UPC contract indicates that UPC was
10 attending and facilitating meetings with the BID's Renewal Steering Committee. (Petition, Ex. H.)
11 Those meetings took place twice monthly in 2017 and included Board Members. (Riskin Decl. ¶11)
12 As such, it is very likely that BID Board Members possess email communications regarding those
13 meetings. Further, given the wide scope of UPC's services, it is likely that UPC corresponded with
14 BID staff members such as the Finance Manager, Operations Director, or Marketing Coordinator.
15 Therefore, it is likely the BID simply refused to search for staff and Board Member emails and/or
16 unlawfully withheld all responsive staff emails under a claim of deliberative process privilege.

17 3. Request #3 – Board Member Linda Becker's emails.

18 On July 31, 2017, Petitioner submitted a request ("Request 3") for copies of all 2017 emails in
19 the possession of Linda Becker. Becker is a BID Board Member and was chair of the BID's
20 Renewal Steering Committee. (Petition ¶23.) The BID did not respond within 10 days with a
21 determination of disclosability and estimated date of production as required by § 6253(c). (Petition
22 ¶24.) On August 18, Petitioner inquired as to the status of the request. The BID responded that there
23 were no responsive records and that it was not claiming exemptions. (Petition ¶24.)

24 Petitioner informed the BID that either a responsive record must exist, or it was deleted after the
25 BID received the request, because the BID emailed Board Members in early August regarding an
26 upcoming meeting. (Petition ¶25.) Thus, either Becker failed to produce that email, or the BID
27 never asked Becker to search for records, or Becker deleted the records in response to the request.

28 The BID, evidently upon realizing that Petitioner was correct, changed its tune. The BID now

1 asserted that Request #3 sought records “exempt from disclosure pursuant to the deliberative
2 process privilege” and the BID agreed to provide the email advising Becker of the Board Meeting.
3 (Petition ¶25.) The BID did not agree to ask Becker to conduct a search for records. (Petition ¶25.)

4 Despite Petitioner’s additional attempts to obtain records, the BID has, to date, failed to produce
5 even a single email from Becker in response to this request, including the email advising Becker of
6 the Board Meeting. (Riskin Decl. ¶12.)

7 **III. LEGAL ARGUMENT**

8 The BID has violated both the procedural and substantive requirements of the CPRA such that
9 declaratory relief and a writ of mandate are necessary. The BID repeatedly failed to comply with
10 procedural requirements. The BID unlawfully denied access to and withheld records by failing to
11 conduct adequate searches for BID staff records, by improperly invoking the deliberative process
12 privilege, and by categorically refusing to search for BID records held in BID Board Members’
13 email accounts. This Court should declare that the BID must comply with the CPRA’s procedural
14 requirements, declare that Board Member emails are subject to the CPRA and must be produced,
15 and issue a writ of mandate directing the BID to conduct a reasonable search for records and to
16 provide all responsive non-exempt records.

17 **A. The BID repeatedly violated procedural requirement of the CPRA such that** 18 **declaratory relief is warranted.**

19 The BID’s disregard for the CPRA’s procedural requirements warrants declaratory relief.
20 Requestors are permitted to sue for declaratory relief under the CPRA. § 6258. Declaratory relief is
21 appropriate where an “actual controversy” exists. CCP § 1060; *Wilson v. Transit Authority* (1962)
22 199 Cal. App. 2d 716, 722. An “actual controversy” includes a probable future controversy, so long
23 as the controversy is ripe. *Environmental Defense Project of Sierra County v. County of Sierra*
24 (2008) 158 Cal. App. 4th 877, 885. Whether a future controversy is probable can turn on whether
25 evidence shows that a Respondent will continue the offending practice. *See California Alliance for*
26 *Utility etc. Education v. City of San Diego* (1997) 56 Cal. App. 4th 1024, 1029-1030 (*California*
27 *Alliance*). A court can presume a Respondent will continue an offending practice in light of a
28 Respondent’s refusal to admit the violation. *Id.*

1 The BID repeatedly failed to comply with the provisions of § 6253(c). Upon receiving a CPRA
2 request, an agency is required to respond within 10 days with a determination as to whether the
3 request, in whole or in part, seeks copies of disclosable public records in the possession of the
4 agency along with an estimated date of production. § 6253(c).⁴ Here, the BID failed to respond
5 within 10 days whatsoever with respect to Requests #1 and #3. (Petition ¶¶ 11, 24.). While the BID
6 responded within 10 days to Request #2, it did not provide a determination as to whether the request
7 sought disclosable records in the BID's possession. Rather, it merely opined that "some" of the
8 requested records were exempt. (Petition ¶19.) In all cases, the BID failed to provide a
9 determination within 10 days as to whether Petitioner could expect the BID to provide records in
10 response to his requests. Similar to the agency in *California Alliance*, the BID refused to admit the
11 violation ("Respondent denies an untimely or improper response."⁵) (Answer ¶¶ 7, 18)) giving rise to
12 the presumption that the violation will reoccur.

13 The BID also failed to inform Petitioner whether it actually withheld records in response to his
14 requests. Where an agency withholds responsive records on the basis of a statutory exemption, "the
15 agency ... must disclose that fact." *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1072; § 6255.
16 Here, in response to all three requests, the BID invoked the deliberative process privilege but did
17 not confirm whether responsive records were actually withheld under that exemption. Again, in its
18 Answer, the BID denied that its responses were improper. (Answer ¶¶ 6, 8, 16, 24.)

19 Thus, the BID repeatedly failed to comply with the procedural requirements in § 6253(c) and §
20 6255. The BID's refusal to admit its violations indicates that it will violate those provisions moving
21 forward. Declaratory relief is warranted and should issue.

22 **B. The BID unlawfully withheld records in response to all three requests.**

23 The BID unlawfully denied access and withheld records in violation of the CPRA.

24 **1. General Principles of the CPRA**

25 Pursuant to the CPRA, individuals have a right to access public records. § 6250, *et seq.* In

26
27 ⁴ In statutorily defined "unusual circumstances" an agency can claim a 14-day extension to provide its § 6253(c)
response. The BID did not claim that extension here.

28 ⁵ The BID's Answer did not address its failure to provide a determination of disclosability in response to Request #2,
other than to state that the response was timely. While timely, the response was substantively deficient.

1 enacting the CPRA, the Legislature declared that "access to information concerning the conduct of
2 the people's business is a fundamental and necessary right of every person in this state." § 6250; *see*
3 *also County of Los Angeles v. Superior Court* (2012) 211 Cal. App. 4th 57, 63. To facilitate the
4 public's access to this information, the CPRA mandates, in part, that an agency, upon a request for
5 records that reasonably describes an identifiable record or records, shall make the records promptly
6 available. § 6253(b).

7 While the CPRA provides permissive exemptions to its disclosure requirements, these
8 exemptions must be narrowly construed and the agency bears the burden of showing that a specific
9 exemption applies. *International Federation of Professional and Technical Engineers Local 21 v.*
10 *Superior Court* (2007) 42 Cal. 4th 319, 329 [burden on agency to justify non-disclosure];
11 *Sacramento County Employees' Retirement System v. Superior Court* (2013) 195 Cal. App. 4th 440,
12 453; California Constitution, article I, section 3(b)(2) [exemptions narrowly construed] Even if
13 portions of a document are exempt from disclosure, the agency must disclose the remainder of the
14 document. § 6253(a).

15 The CPRA requires that an agency "assist the member of the public [to] make a focused and
16 effective request that reasonably describes an identifiable record or records" by taking steps to
17 "[a]ssist the member of the public to identify records and information that are responsive to the
18 request or the purpose of the request, if stated" and must "[p]rovide suggestions for overcoming any
19 practical basis for denying access." § 6253.1.

20 The BID is subject to the CPRA as a matter of state law. California Streets and Highway Code §
21 36612. The BID's contract with the City of Los Angeles also mandates that the BID and its Board of
22 Directors must comply with the CPRA. (Petition ¶13.)

23 If an agency fails to comply with these provisions, the CPRA authorizes a requestor to file a
24 petition for writ of mandate to enforce the right to inspect or to receive a copy of records. § 6258. If
25 the Court finds that the failure to disclose is not justified, it shall order the agency to make the
26 record public. § 6259(b).

27 Public policy favors judicial enforcement of the CPRA. The CPRA contains a mandatory
28 attorney's fee provision for the prevailing plaintiff. § 6259(d). The purpose of the provision is to

1 provide “protections and incentives for members of the public to seek judicial enforcement of their
2 right to inspect public records subject to disclosure.” (emphasis added) *Filarsky v. Superior Court*
3 (2002) 28 Cal.4th 419, 427. A plaintiff prevails under the CPRA where the plaintiff shows that an
4 agency unlawfully denied access to records. *Community Youth Athletic Center v. City of National*
5 *City* (2013) 220 Cal.App.4th 1385, 1446-1447. An agency is not protected from liability merely
6 because the denial of access was due to the agency’s internal logistical problems or general neglect
7 of its duties. *Id.*

8 2. BID Board Member emails related to BID business are subject to the CPRA,
9 regardless of where they are held.

10 All three requests at issue call for emails in the possession of BID Board Members. These
11 emails are subject to the CPRA under both *City of San Jose v. Superior Court* (2017) 2.Cal.5th 608
12 (*City of San Jose*) and the BID’s contract with the City, regardless of whether the emails are located
13 in a BID-controlled email account or device, or in a private email account or device.

14 BID Board Member emails are subject to the CPRA under the California Supreme Court’s
15 decision in *City of San Jose*. There, the Requestor sought emails from the mayor, two city council
16 members, and their staffs, regardless of whether those emails were located in public or private
17 devices and accounts. *Id.* at 615. The Court held that emails relating to public business in private
18 devices and accounts of public officials and employees are within the scope of the CPRA. *Id.* at
19 629. The Court’s reasoning, as applied to this matter, shows that BID Board Member emails are
20 similarly within the scope of the CPRA, regardless of where those records are held.

21 Emails can be “public records” under § 6252(e), even if located in private accounts. In *City of*
22 *San Jose*, the City argued that employee emails in personal accounts were not “prepared, owned,
23 used, or retained” by the agency and thus not “public records” under § 6252(e). *Id.* at 619. The
24 Supreme Court rejected this argument by invoking the “prepared by” prong of § 6252(e). *Id.* at 620.

25 The Court also rejected the City’s contention that emails in private accounts were not “public
26 records” because the individual officers and employees are not a “local agency” under § 6252 and
27 thus records “prepared by” these individuals were not prepared by the agency. *Id.* at 620. The Court
28 found this argument flawed. *Id.* The City’s narrow construction of a statute conferring access to

1 records violated the constitutional directive of broad interpretation of the CPRA to further access.

2 *Id.* Further, the term “local agency” logically includes the individual officers and staff who conduct
3 the agency’s affairs because:

4 It is well established that a governmental entity, like a corporation, can act
5 only through its individual officers and employees. [internal citations
6 omitted]. A disembodied governmental agency cannot prepare, own, use,
7 or retain any record. Only the human beings who serve in agencies can do
8 these things. (emphasis added).

9 Thus, the Supreme Court found that individual public officials and employees can “prepare”
10 records subject to the CPRA and, thus, their emails are not categorically exempt under § 6252.

11 The Court also found that an agency has a duty to search for emails held in private accounts
12 under § 6253(c). The City argued that emails in the personal accounts of employees and officers
13 were beyond the City’s reach and, thus, fall outside the CPRA. *Id.* at 622. The Supreme Court
14 rejected this argument. *Id.* First, the Court found that, in addition to having been “prepared by” the
15 agency, a writing retained by a public employee conducting agency business has been “retained by”
16 the local agency within the meaning of § 6252(e), “even if the writing is retained in the employee’s
17 personal account.” *Id.* at 623. The Court continued that a record “in the possession” of individual
18 officers and employees is, in fact, “in the possession of” an agency under § 6253(c). *Id.* at 624. The
19 Court explicitly rejected the City’s contention that a document concerning official business is only a
20 public record if it is located on a government agency’s computer servers or in its offices, stating:

21 Likewise, there is no indication the Legislature meant to allow public
22 officials to shield communication about official business simply by
23 directing them through personal accounts. Such an expedient would gut
24 the public’s presumptive right of access and the constitutional imperative
25 to broadly construe this right. (internal citations omitted).

26 *Id.* Thus, an agency must search for public records held in private email accounts under § 6253(d).

27 The Court also identified policy considerations underlying its decision. The Court emphasized
28 that the CPRA’s purpose—to ensure transparency in government activities—would be undermined if
29 the CPRA could be evaded simply by use of a private account. *Id.* at 625. The Court rejected that
30 public official and employee privacy is necessarily invaded by its holding, stating that “any
31 personal information not related to the conduct of the public business could be redacted, and that

1 the Act itself provides exemptions to accommodate this concern.” *Id.* at 626. Finally, the Court
2 explicitly rejected the City’s argument that a search for documents, in and of itself, is an evasion of
3 privacy sufficient to exclude privately held emails from the CPRA. *Id.* at 626. Thus, *City of San*
4 *Jose* is a powerful statement in favor of the disclosability of public records, regardless of whether
5 they are held in a private or agency-controlled accounts and devices.

6 Emails held in BID Board Member’s private email accounts and devices are subject to the
7 CPRA under *City of San Jose*. The analysis in *City of San Jose* did not turn on whether public
8 officials were paid or unpaid, or whether an agency had “constructive control” of records held by
9 employees. Rather, as discussed above, it turned on whether public officials and employees were
10 the embodiment of the agency. Because the Court found they were, it found that the term “local
11 agency” encompassed public officials and employees, that records prepared by officials and
12 employees are prepared by the agency, and that records possessed by officials and employees are
13 possessed by the agency. The same analysis applies to BID Board Members, irrespective of whether
14 BID Board Members are employees or non-employees, paid or volunteer.

15 In fact, the reasoning in *City of San Jose* applies even more strongly to BID Board Members
16 than to City employees. The *City of San Jose* Court held that the term “local agency” encompasses
17 officials and employees by reasoning analogously to a corporation *Id.* at 621. Here, the BID is a
18 non-profit corporation, and no analogy is required. As a corporation, the BID’s activities and affairs
19 are conducted by the Board and, by law, all corporate power is exercised by or under the direction
20 of the Board. *See* Cal. Corporations Code § 5210; *see also Kennerson v. Burbank Amusement Co.*
21 (1953) 120 Cal. App. 2d 157, 173. There is no question that, as a corporation, the BID’s Board of
22 Directors are the embodiment of the BID when conducting BID business. Thus, to the extent that
23 public records held in the private accounts of public officials and employees are subject to the
24 CPRA, so, too, are those records held in the private accounts of BID Board Members.

25 The policy considerations in *City of San Jose* also dictate that Board emails are subject to the
26 CPRA. Just as the public’s right of access would be “gutted” if public officials could evade the
27 CPRA by simply using private accounts, so, too, would that right be gutted if BIDs could evade
28 transparency by conducting business in private accounts. The Legislature explicitly made BIDs

1 subject to the CPRA.⁶ Its judgment would be undermined if the BIDs could so easily sidestep the
2 CPRA's requirements. Further, just as the privacy concerns in *City of San Jose* were not sufficient
3 to "tip the scales" in favor of categorical non-disclosure, so too, does any privacy concern fail to tip
4 the scales here. As such, emails related to BID business, created or held by BID Board Members,
5 are subject to the CPRA under *City of San Jose*, regardless of where those records are held.

6 Board Member emails are subject to the CPRA under the BID's contract with the City of Los
7 Angeles, even assuming, *arguendo*, they are not subject under *City of San Jose*. That contract
8 explicitly states that the "Corporation and the Board of Directors are also subject to and must
9 comply with the California Public Records Act." (emphasis added) (Petition ¶13.). The contract,
10 entered into prior to the Court's decision in *City of San Jose*, removes any ambiguity that the Board
11 of Directors—as distinct from the Corporation—is subject to the CPRA, and it provides no limitation
12 based on whether Board Members hold records in private or BID-controlled accounts and devices.
13 As such, Board Member emails are subject to the CPRA under the BID's contract with the City.

14 In conclusion, under both *City of San Jose*, and the BID's contract with the City of Los Angeles,
15 BID Board Member's emails related to the operation of the BID are subject to the CPRA, regardless
16 of whether they are held in private accounts. Thus, Petitioner's requests triggered the BID's duty to
17 search for and provide BID Board Member emails, which it failed to do. Declaratory relief and a
18 writ of mandate should issue.

19 3. The BID denied access and unlawfully withheld records in response to all three of
20 Petitioner's requests.

21 The BID, in response to all three of Petitioner's CPRA requests, violated the CPRA by
22 unlawfully denying access to and/or withholding records.

23 As an initial matter, all three of Petitioner's requests called for emails sent or received by BID
24 Board Members. The BID failed to provide even a single BID Board Member email, presumably
25 based on its belief that Board Member emails held in private accounts fall outside of the reach of
26 the CPRA. As shown above, that position is incorrect. The BID had a duty to search for those
27 records and, in refusing to do so, violated the CPRA and unlawfully denied Petitioner access to

28 ⁶ California Streets & Highways Code § 36612.

1 those records.

2 It is possible that, in the time since Petitioner made his requests or filed this litigation, BID
3 Board Members destroyed all responsive emails in their possession. The BID may argue that,
4 because those emails have been destroyed, Plaintiff cannot “prevail” in this litigation or be entitled
5 to an award of costs and attorney’s fees under § 6259(d). The BID’s reliance on a subsequent
6 destruction of records would be misplaced. *See Community Youth Athletic Center v. City of*
7 *National City* (2013) 220 Cal.App.4th 1385, 1445-1447 [where an agency failed to adequately
8 communicate the contents of a CPRA request to the custodian of records, and the records were not
9 produced and subsequently destroyed, the Court remanded with the instruction that the requestor
10 may be found to have “prevailed” under the CPRA based on obtaining declaratory relief that
11 violations occurred, despite not recovering additional records.]; *See also Galbiso v. Orosi Public*
12 *Utility Dist.* (2008) 167 Cal. App. 4th 1063, 1088-1089 [a requestor prevailed under the CPRA and
13 was entitled to attorney’s fees where the agency denied access by forcing the requestor to leave the
14 premises, regardless of whether the lawsuit resulted in additional disclosure.] Thus, if this Court
15 finds that BID Board Member emails located in non-BID accounts are subject to the CPRA,
16 Petitioner has prevailed, even if Respondent subsequently destroyed all responsive records.

17 The BID also unlawfully denied access to staff emails—either by a failure to search or by
18 overclaiming exemptions—in response to Requests #1 and #2.

19 Regarding Request #1—staff and Board emails to the South Park BID and/or the DLANC—
20 Petitioner has obtained multiple emails which are both responsive to this request, and do not fall
21 under any exemption. (Riskin Decl. ¶3.) The BID failed to provide these emails in response to
22 Petitioner’s request. While the BID has declined to state whether it actually withheld responsive
23 records, it is clear from the responsive, non-exempt emails Plaintiff obtained from other BIDs, that
24 the BID unlawfully denied access to staff emails, either via an inadequate search or by overclaiming
25 the deliberative process privilege.

26 Regarding Request #2—staff and Board emails (exclusive of Director Leddy) to UPC—the BID
27 failed to provide even a single record in response to this request. As with Request #1, the BID did
28 not clearly state that it withheld records subject to the deliberative process. However, given the total

1 lack of a production, and the extremely high likelihood that UPC communicated with BID staff and
2 Board Members—in light of the twice monthly Renewal Committee meetings and the wide scope of
3 UPC’s duties under its contract for services—it is clear the BID unlawfully denied access, either via
4 an inadequate search or by overclaiming the deliberative process privilege.

5 4. The public interest in disclosure of these records is significant.

6 There is a significant public interest in all requested records. As stated above, the Legislature
7 determined BID operations should be transparent, establishing the public interest in disclosure of
8 even mundane records related to the BID. Here, the political nature of these records amplifies the
9 public interest in disclosure.

10 BIDs use publicly-disbursed monies to collaborate to wield political influence on issues such as
11 homelessness (Cisneros Decl. Ex A.) Respondent, during this period, coordinated with other BIDs
12 to impact the Skid Row Neighborhood Council formation election. (Petition, Ex. F.) Los Angeles
13 BIDs, including Respondent, participate in the Los Angeles BID Consortium, an association
14 through which BIDs share information and coordinate political advocacy. (Riskin Decl., Ex. B).

15 Withheld records responsive to Request #1 include records related to the BID Consortium and
16 other inter-BID political collaboration on issues such as homelessness, street vending, and the Skid
17 Row Neighborhood Council Formation Election (Riskin Decl. ¶¶6, 10.) Given the political nature of
18 those emails, the public interest in disclosure is high.

19 Request #2 pertains directly to the BID’s lobbying of the City Council related to Council’s
20 renewal of the BID via ordinance. The high public interest in City lobbying is illustrated by the Los
21 Angeles Municipal Lobbying Ordinance, Los Angeles Municipal Code § 48.01, *et seq.* As these
22 records concern how the BID engages consultants to lobby on its behalf, the public interest in
23 disclosure of these records is high.

24 **C. The Court should inspect withheld records in camera prior to finding they were**
25 **properly withheld.**

26 To the extent the BID actually withheld records subject to exemptions, Petitioner requests that
27
28

1 the Court examine the records in camera before finding they were properly withheld.⁷ An in camera
2 examination is explicitly permitted and contemplated by the CPRA. § 6259(a).

3 The only exemption the BID invoked is the so-called deliberative process privilege. This is not
4 an absolute privilege, but rather it applies only when a public agency can meet the burden of
5 showing that the interest in non-disclosure of a record “clearly outweighs” the interest in disclosure
6 under § 6255. *Marylander v. Superior Court* (2000) 81 Cal. App. 4th 1119, 1127-28. “Not every
7 disclosure which hampers the deliberative process implicates the deliberative process privilege.
8 Only if the public interest in nondisclosure clearly outweighs the public interest in disclosure does
9 the deliberative process privilege spring into existence.” (*Id.* at 1128.) Respondent has made no
10 showing of any strong interest in non-disclosure and has not established that any of the
11 communications it has withheld are either “pre-decisional” or “deliberative.” Here, as in *American*
12 *Civil Liberties Union of Northern California v. Superior Court* (2011) 202 Cal. App. 4th 55, 76-77,
13 (*ACLU*) Respondent has not met, and cannot meet, its burden of establishing any deliberative
14 process privilege because public interest in disclosure is high, and there is no cognizable interest in
15 non-disclosure which would “clearly outweigh” that interest.⁸ Because the deliberative process
16 privilege is subject to balancing, and because an agency must show clear overbalance on the side of
17 nondisclosure to claim the privilege, the deliberative process privilege is a “limited, qualified public
18 disclosure exemption.” *See Caldecott v. Superior Court* (2015) 243 Cal. App. 4th 212, 226 [ruling
19 in favor of disclosure]; *ACLU, supra*, at 77 [“the trial court’s conclusion that the public interest
20 favoring withholding of the information sought by petitioner outweighs that favoring disclosure
21 cannot be sustained”].

22 It is insufficient for an agency to merely invoke the policy underlying the deliberative process
23 privilege to withhold records; an agency must make a specific factual showing as to why the
24 privilege is necessary to protect the deliberative process in that instance. (emphasis added). *Citizens*

26 ⁷ The BID refused to confirm, both before and after Petitioner filed this litigation, whether it actually withheld records
subject to exemption, including the so-called deliberative process privilege.

27 ⁸ While the BID may cite *Times Mirror Co. v. Superior Court* (1991) 53 Cal. 3d 1325, that 4-3 decision by the Court is
28 easily distinguishable. It involved a request for five-years worth of the Governor’s calendars and the Court recognized
that a more narrowly-focused request might well call for a different result. Both the nature of the requests in *Times*
Mirror -- aimed at an executive decision-maker -- and its scope (five years of calendars) distinguish it from this case.

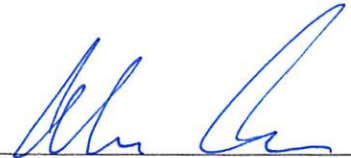
1 *For Open Government v. City of Lodi* (2012) 205 Cal. App. 4th 296, 307 [agency failed to meet its
2 burden to establish the deliberative process privilege when it invoked policy reasons alone.]

3 When an agency fails to meet its burden of justifying non-disclosure, a court can and should
4 order disclosure of records without conducting an in camera review. *ACLU, supra*, at 87 [in camera
5 review is not a substitute for the government's obligation to justify its withholding in publicly
6 available and debatable documents.] The Court can also conduct an *in camera* review under
7 Government Code section 6259(a) if it concludes that the matter cannot otherwise be resolved. *Id.*
8 Accordingly, the records sought should be ordered disclosed or, in the alternative, the court should
9 conduct an in camera review and then, after review, order disclosure.

10 IV. CONCLUSION

11 The public's right to know, expressed in statute, Constitution, case law, and voter initiative,
12 is well established in California. Here, the BID has shirked its responsibilities under the CPRA by
13 failing to comply with procedural requirements, by failing to conduct an adequate search of staff
14 emails, by unlawfully withholding records, and by categorically refusing to provide BID Board
15 Member emails. This Petition should be granted and the BID should be ordered to disclose the
16 records sought by the Petition.

17
18 Dated: April 25, 2019

By: 

Abenicio Cisneros,
Attorney for Petitioner and Plaintiff